85-1390

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FRANCES ARMSTRONG, EMMA WEBBER,
JOHN FEDOR, JR.,

Petitioners,

vs.

W. BRUCE THOMAS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether members of a class who enter an appearance in a pending class action and who file a timely notice of appeal have the right to appeal issues determined by the trial court but abandoned on appeal by the class representatives.

II. Whether in the above situation, a federal circuit court of appeals has the discretionary authority to permit such appeal by unnamed class members?

PARTIES TO THE PROCEEDINGS

Petitioners are Frances Armstrong, Emma Webber, and John Fedor, Jr., three former shareholders of respondent Marathon Oil Company at the time of a tender offer for a majority of Marathon shares by respondent U.S. Steel Corporation in November, 1981, and a subsequent March, 1982, freeze-out going private merger when Marathon became a wholly-owned subsidiary of U.S. Steel. Petitioners are members of the plaintiff class of shareholders in the action originally brought by Irving and Charlotte Radol, and others as named class plaintiffs. During the course of the class action proceeding petitioners obtained separate counsel and entered a Notice of Appearance, on behalf of themselves and all other members of the class, while the action was pending in the United States District Court for the Southern District of Ohio. Thereafter petitioners filed a Notice of Appeal with respect to certain rulings of the trial court dismissing claims on behalf of the class.

Respondents are W. Bruce Thomas, William R. Roesch, David M. Roderick, United States Steel Corporation, USS Inc., USS Holdings Company, USS Merger Sub, Inc., Goldman Sachs & Co., Marathon Oil Company, Harold D. Hoopman, Charles H. Barre, Elmer H. Graham, W.E. Swales, Jack H. Herring, Victor G. Beghini, Neil A. Armstrong, James A.D. Geier, J.C. Haley, J.N. Land, Jr., Raymond C. Tower, Robert G. Wingerter, and the First Boston Corporation. Respondents are defendants and were appellees below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANT OF WRIT	8
POINT I: IT WAS A DENIAL OF DUE PROCESS AND AGAINST ESTABLISHED JUDICIAL PROCEDURE FOR THE SIXTH CIRCUIT COURT OF APPEALS TO DISMISS THE ARMSTRONG PLAINTIFFS' APPEAL FROM FINAL JUDGMENT, WHEN THEIR APPEAL WAS AS OF RIGHT PURSUANT TO THEIR FILING OF A NOTICE OF APPEARANCE WITH THE TRIAL COURT AND A TIMELY NOTICE OF APPEAL	8
POINT II: IT WAS WITHIN THE INDEPENDENT, INHERENT POWERS OF THE SIXTH CIRCUIT TO ALLOW PETITIONERS FULL APPELLATE PARTICIPATION, AND IT WAS THEREFORE A DENIAL OF DUE PROCESS AND AGAINST PROPER JUDICIAL PROCEDURE FOR THE COURT TO REFUSE TO CONSIDER THE APPROPRIATENESS OF PETITIONERS' INTERVENTION AT THE APPELLATE LEVEL FOR PURPOSES OF REVIEWING SUBSTANTIVE ISSUES WHICH	

Page

THE NAMED CLASS PLAINTIFFS HAD ABANDONED ON APPEAL 12

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDICES

A. Partial Transcript of Oral Argument Before a Panel of the United States Court of Appeals, Sixth Circuit, on January 22, 1985 ..... 1a

B. Notice of Appeal (Trial Court) of August 9, 1983 . 6a

C. Notice of Appeal (Trial Court) of September 19, 1983 ..... 8a

D. Order of September 26, 1985 ..... 10a

E. Order of November 1, 1985 ..... 11a

F. Relevant Statutory Provisions 12a

TABLE OF AUTHORITIES

Cases:	Page
Ace Heating & Plumbing Co. v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971)	10
Adams v. *Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979)	12
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974)	9
Armstrong v. *Board of School Directors*, 616 F.2d 305 (7th Cir. 1980)	10
Armstrong v. *Marathon Oil Co.*, Case No. 5-84-9 (Ct.App., Hancock County, Ohio, January 14, 1986)	7
Auerbach v. *Bennett*, 408 N.Y.S. 2d 83 (1978), *modified* 419 N.Y.S. 2d 920 (1979)	13
Cohen v. *Young*, 127 F.2d 721 (6th Cir. 1942)	9
Cooper v. *Federal Reserve Bank*, ____ U.S. ____, 104 S.Ct. 2794 (1984)	11
Dosier v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981)	9
Fickle v. *Adkins*, 385 So. 2d 1141 (Fla. Dist. Ct. App. 1980)	11
Holland v. *Board of Public Instruction of Palm Beach County, Florida*, 258 F.2d 730 (5th Cir. 1958)	13
Jordan v. *Global Natural Resources, Inc.*, 102 F.R.D. 45 (S.D. Ohio 1984)	14
Kornfield v. *Perl Mack Liquors, Inc.*, 567 P.2d 383 (Colo. 1977)	13
McCullough v. *Scott*, 109 S.E. 789 (N.C. 1921)	13
McKenna v. *Pan American Petroleum Corp.*, 303 F.2d 778 (5th Cir. 1962)	13

Page

Mires v. *Hogan*, 192 P. 811 (Okla. 1920) 13

Overby v. *United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955) 12

Patterson v. *Stovall*, 528 F.2d 108 (7th Cir. 1976) 9

Piper v. *Central Louisiana Electric Co.*, 437 So. 2d 997 (La. App. 1983) 11

Preston v. *United States*, 284 F.2d 514 (9th Cir. 1960) ... 13

Radol v. *Thomas* 772 F.2d 244 (6th Cir. 1985) 1, 5

Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), *and later appealed*, *Oswald* v. *McGarr*, 620 F.2d 1190 (7th Cir. 1980) 10-11

Re Roth's Estate, 52 A. 2d 811 (N.J. 1947) 13

Research Corp. v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970) 9

Re Tomlinson's Estate, 359 N.E. 2d 109 (Ill. 1976) 13

Reynolds v. *National Football League*, 584 F.2d 280 (8th Cir. 1978) 9

Senter v. *General Motors Corp.*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) 14

Stoller v. *Baldwin United Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 91, 678 (September 19, 1984) 14

Tisdale v. *Wheeler Brothers Grain Co.*, 599 P.2d 1104 (Okla. 1979), *later proceeding*, *Abel* v. *Tisdale*, 619 P. 2d 608 (1980), *appealed*, 673 P. 2d 836 (1983) 11

Toulouse v. *New York Life Insurance Co.*, 235 P. 2d 1003 (Wash. 1951) 13

Young v. *Katz*, 447 F.2d 431 (5th Cir. 1971) 9

Page

Other Authorities:

28 U.S.C. Section 1254(1) 2

Rule 23, *Federal Rules of Civil Procedure* 2, 3, 14

SEC Rule 13e-3, 17 CFR § 240 13e-3..... 3, 5

2 H. Newberg, *Class Actions* §§ 2830, 1.07 .....9, 10

9 *Moore's Federal Practice* ¶ 203.04 8

IN THE

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OCTOBER TERM, 1985

No. 85-_____

FRANCES ARMSTRONG, *et al.*

Petitioners,

vs.

W. BRUCE THOMAS, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Frances Armstrong, Emma Webber and John Fedor, Jr., on behalf of themselves and similarly-situated former shareholders of the Marathon Oil Company, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered on November 1, 1985, denying a rehearing of the judgment of September 26, 1985.

OPINIONS BELOW

On September 13, 1985, the Sixth Circuit Court of Appeals rendered its decision and opinion in *Radol, et al.* v. *Thomas, et al.*, 772 F.2d 244 (6th Cir. 1985), the class action brought by the named class Marathon plaintiffs (hereinafter "Radol plaintiffs" or "named class plaintiffs"). Prior to issuing this

decision, a panel of the Sixth Circuit entertained oral argument on the matter, including argument from the parties to this petition (hereinafter the "Armstrong plaintiffs" or "petitioners") who had sought to appear on behalf of the class to argue certain issues on appeal which the named class plaintiffs had abandoned. This proceeding was tape recorded, and a partial transcript of the recording appears as Appendix A. (The Notices of Appeal filed by petitioners which brought them before the Sixth Circuit appear as Appendices B and C.) During argument, the Sixth Circuit panel announced its decision to dismiss the Armstrong plaintiffs; however this decision was not journalized until September 26, 1985, and appears as Appendix D. The Armstrong plaintiffs requested rehearing of the dismissal from the Sixth Circuit *en banc*, which was denied by Order of November 1, 1985, and appears as Appendix E.

JURISDICTION

The final judgment of the Sixth Circuit Court of Appeals was dated and entered on November 1, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

No statutes as such are involved. However the proper interpretation and application of Rule 23 of the Federal Rules of Civil Procedure is at the heart of this case, and a portion of said Rule is set forth as Appendix F.

STATEMENT OF THE CASE

This action is a consolidation of numerous class action claims originally brought separately by various former shareholders of the Marathon Oil Company, which was the target of a two-tier takeover by the United States Steel Corporation in 1982. Prior to trial, the United States District Court for the Southern District of Ohio, Judge Rubin presiding, granted summary judgment dismissing certain claims alleged by the Radol named class plaintiffs, most notably a claim under SEC Rule 13e-3, 17 CFR § 240.13e-3, which alleged that the defendants failed to disclose certain material facts concerning the second-tier merger aspect of the takeover. Consequently, the only issues tried on the merits to the jury focused on the first-tier tender offer, to the exclusion of any consideration of the legality of the merger as a distinct transaction. At trial the respondents prevailed on all counts.

As part of the proceedings, three former Marathon shareholders (the above identified "Armstrong plaintiffs" or "petitioners") filed a separate Notice of Appearance with the trial court pursuant to Rule 23c(2)(C) of the Federal Rules of Civil Procedure and subsequently filed a Notice of Appeal as party plaintiffs with respect to the rulings of the trial court dismissing plaintiffs' claims. Appendix at 6a. They also moved to intervene at the trial level for the purpose of prosecuting an appeal. The trial court denied the Motion to Intervene, and from that decision the Armstrong plaintiffs filed a second Notice of Appeal with respect to that ruling. Appendix at 8a. The purpose of the Armstrong plaintiffs' appeals (consolidated by the Sixth Circuit Court of Appeals into one) was to bring before the reviewing court the claims which examined the validity of the second part of the takeover, the merger — claims which the trial court dismissed through summary judgment. By Order of April 19, 1984, the Sixth Circuit directed all parties to the various appeals (consolidated by the court)[1] to brief the procedural and substantive issues.

[1] Thus, the Sixth Circuit actually consolidated four separate appeals: one from the Radol named-class plaintiffs; two from the Armstrong plaintiffs;

On November 3, 1983, the Radol plaintiffs filed their appellate brief on the merits. Although they had noted the merger claims in their Statement of the Issues filed with the court pursuant to their Notice of Appeal, they did not raise for review any of these issues in their brief on the merits. Petitioners thereafter filed their brief on the merits, which examined extensively the Rule 13e-3 and other merger claims, all of which the named class plaintiffs had failed to bring before the court of appeals and which would have been otherwise lost.

On January 22, 1985, a panel of the Sixth Circuit entertained oral argument, including a brief dialogue with counsel on the procedural propriety of the Armstrong plaintiffs' appellate appearance. *See generally* Appendix at 1a-5a. At the close of this argument, the court announced from the bench that it would grant the respondents' Motion to Dismiss the petitioners' two consolidated appeals, and it further ruled that it had no power to grant appellate intervention on a discretionary basis. Appendix at 3a-5a. These decisions precluded any substantive disposition of the issues surrounding the merger.

On September 13, 1985, the Sixth Circuit Court of Appeals rendered its decision on the merits, affirming in whole the district court. That opinion did not address the substantive issues raised by the Armstrong plaintiffs, as such were not raised or addressed by the representative class plaintiffs in their briefs. The Armstrong plaintiffs therefore petitioned the Sixth Circuit for a rehearing *en banc* of their dismissal from the appeal in order to preserve the crucial issues arising from the second-tier merger, even though the Sixth Circuit panel's oral dismissal had not been journalized.

By Order dated September 26, 1985, the Sixth Circuit officially dismissed the Armstrong plaintiffs from the case. Appendix at 10a. Petitioners renewed their request for rehearing

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and one from plaintiff Tjarks, a class member who had individually filed a separate notice of appeal.

en banc. The court thereafter denied petitioners' request for rehearing *en banc* by Order of November 1, 1985. Appendix at 11a.

The brief on the merits submitted by the Armstrong plaintiffs to the Sixth Circuit Court of Appeals dealt with issues relating to the merger — issues which are vital to the class plaintiffs' position but which the Radol plaintiffs abandoned on appeal. For instance, the Armstrong plaintiffs demonstrated how respondents violated Rule 13e-3 of the Securities and Exchange Commission, 17 CFR § 240.13e-3, by failing to state in the proxy statement that the merger price was fair. Instead they emphasized the blended price of $106, which included both the tender offer price and the merger cash-out price. Since this was a two-tiered transaction, the prices were separate. The front-end tender offer paid $125 per share and the back end cash out merger offered only securities worth $76 per share of Marathon stock. The proxy statement related only to approval of the merger, since the tender offer had been completed. The Armstrong plaintiffs argued that Rule 13e-3 required a statement as to the fairness of the cash-out price and a detailed discussion as to all factors relating to this price, but that this requirement was not met where the opinion and the discussion related to a different, hypothetical price derived by blending together two distinct transactions. The need for complete discussion of the fairness of the $76 back-end price was especially important in light of the fact that Marathon had previously stated publicly that a competing tender offer of $85 for all shares of Marathon was grossly inadequate.

In its opinion of September 13, 1985, the Sixth Circuit implicitly acknowledged the validity of these arguments in that it clearly held that the tender offer and cash-out merger were separate and distinct transactions. *Radol* v. *Thomas*, 772 F.2d 244, 254 (6th Cir. 1985). The appellate court also recognized the extensive disclosure requirements of Rule 13e-3 and the practical necessities for the extra degree of disclosure:

> The more extensive legal disclosure requirements which apply to freeze-out merger proxy statements are therefore justified by the fact that the law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, leaving minority shareholders with only the option of dissent and appraisal, an option which cannot rationally be exercised unless the majority is compelled to make full disclosure regarding appraisals, earnings projections and other information that sheds a light on the value of the firm.

Id. at 255. Despite this clear recognition of the vital importance of the disclosure rules for the second tier of two-tiered acquisitions, the Sixth Circuit failed to consider whether these requirements were satisfied in the Steel-Marathon takeover, because the named class plaintiffs abandoned these issues on appeal and the Sixth Circuit refused to consider the Armstrong plaintiffs' substantive arguments.

The named class plaintiffs have focused on disclosure requirements at the time of the $125 per share cash tender offer, when Marathon disclosed no estimate of the value of its oil and gas reserves and other assets. The Armstrong plaintiffs, by contrast, pointed to, among other things, the asset disclosure made at the time of the $76 per share merger offer, contending that it falsely informed shareholders that the asset value estimated by the First Boston Corporation at $189-226 per share could not be realized. These are entirely separate bases for relief which must both receive substantive consideration for proper representation of the class. If damages were found in this case in the amount of the difference between the merger price and the estimated asset value of $200 per share, the plaintiff class would be entitled to an award totaling approximately 3.5 billion dollars.

The Sixth Circuit panel's sole inquiry as to the petitioners was whether the trial court abused its discretion in denying their Motion to Intervene at the trial level. By limiting its

review of the Armstrong plaintiffs' appeals to a consideration of the trial court's discretion,[2] the Sixth Circuit erroneously failed to acknowledge that petitioners were properly before the appellate court *as of right* pursuant to their Notice of Appeal on the merits, or, alternatively, that it had independent, inherent power to hear the Armstrong claims by granting appellate intervention, regardless of and unrelated to the trial court's determinations.

Petitioners respectfully request this Court to grant a writ of certiorari to review the procedural bases for the Sixth Circuit's granting of the defendants' Motion to Dismiss the Armstrong appeals. The ruling of the Sixth Circuit Court of Appeals is in conflict with the positions of other circuits which do allow class members to appeal adverse rulings and which recognize the discretionary power of a court of appeals to allow appeals by non-parties who are adversely affected by rulings of the trial court. The appellate court's dismissal is a serious departure from the accepted course of judicial proceedings and denies absent class members the right to protect their interests by intervening when appointed class counsel abandon major damage claims on appeal. The issues here present important questions of the administration of class actions and the use of class actions to vindicate important rights created by federal law. Granting of the writ is of fundamental importance as it provides the only possible avenue for a determination by the Sixth Circuit Court of Appeals of all issues relating to the legality of the merger.[3] These are signifi-

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[2] The Armstrong plaintiffs sought to intervene at the trial level as a non-discretionary matter of right and, alternatively, at the court's discretion. Petitioners do not question the Sixth Circuit's review of the narrow question of trial intervention, nor did they in their Request for Reconsideration *En Banc*.

[3] In separate litigation before Ohio state courts, a number of former Marathon shareholders, representing a small fraction of the shares outstanding at the time of the merger, are seeking a court determined "fair cash value" in lieu of the merger price for those shares. *Armstrong* v. *Marathon Oil Co.*, Case No. 5-84-9 (Ct.App., Hancock County, Ohio, January 14, 1986). While plaintiffs Armstrong and Webber are parties to that case as well,

cant legal questions having important ramifications in the present economic climate of mergers and acquisitions. They are also of paramount importance to the thousands of class members who were once Marathon shareholders.[4]

REASONS FOR GRANT OF WRIT

POINT I

IT WAS A DENIAL OF DUE PROCESS AND AGAINST ESTABLISHED JUDICIAL PROCEDURE FOR THE SIXTH CIRCUIT COURT OF APPEALS TO DISMISS THE ARMSTRONG PLAINTIFFS' APPEAL FROM FINAL JUDGMENT, WHEN THEIR APPEAL WAS AS OF RIGHT PURSUANT TO THEIR FILING OF A NOTICE OF APPEARANCE WITH THE TRIAL COURT AND A TIMELY NOTICE OF APPEAL.

Any party to an action may prosecute an appeal from a final appealable order. 9 *Moore's Federal Practice* ¶ 203.04 *et seq.* (1985) and cases cited therein. All class members are, by definition, parties to a class action, whether technically la-

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plaintiff Fedor is not and the intervention suit here is on behalf of the entire class of former shareholders represented by the Radols. The eventual state appraisal award could in no event be considered an adequate substitute for intervention in the present case to pursue on behalf of all former Marathon shareholders who have not opted out of the Radol class the serious claims of violation of federal law not appealed by the class representatives.

[4] The named class plaintiffs filed a petition for certiorari with this Court on December 12, 1985, and did not raise the merger issues, as indeed they could not, since they failed to being them properly before the Sixth Circuit Court of Appeals. Petitioners are not requesting this Court to determine the substantive issues relating to the merger but only to rule that they were entitled to present these to the Sixth Circuit Court of Appeals for a ruling on the merits.

beled such or not. 2 Newberg, *Class Actions* § 2830 (1977); §§ 1.07 *et seq.* (2d ed. 1985). *Accord, American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 549 (1974). Potential class members may either withdraw or agree to class representation. This Court has stated that thereafter "they are either non-parties to the suit and ineligible to participate in a recovery . . . or else they are full members who must abide by the final judgment. . . ." *Id.* at 549. Accordingly, class members also have standing to appeal from adverse decisions and object to settlements. *See, e.g., Dosier* v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981); *Reynolds* v. *National Football League*, 584 F.2d 280 (8th Cir. 1978); *Patterson* v. *Stovall*, 528 F.2d 108 (7th Cir. 1976); *Young* v. *Katz*, 447 F.2d 431 (5th Cir. 1971).

In this class action, petitioners filed a Notice of Appearance with the trial court and, pursuant to that Notice, filed a timely appeal from the final judgment. Procedurally this was sufficient to perfect their appeal on the merits as of right. *See generally, e.g., Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Cohen* v. *Young*, 127 F.2d 721 (6th Cir. 1942).[5]

Petitioners clearly sought to participate in the appeal as was their right in order to preserve on appeal those issues which the named class plaintiffs abandoned on appeal and which had never been heard on the merits due to the trial court's summary dismissal. Nevertheless, the appellate court

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[5] During oral argument, the Sixth Circuit panel posed the hypothetical possibility that a Notice of Appearance could not give a class member any participatory rights because class action lawsuits would be reduced to mass multiple-plaintiff chaos, and, as such, impossible to litigate. That court's concern over imagined hydra-headed plaintiffs is entirely speculative. This case arose out of one of the biggest takeovers and mergers in the corporate history of the United States, yet only two non-named class plaintiffs (out of a class of roughly 50,000) sought to participate separately. Even this small showing is atypical as most class members are reluctant and unable to assume the great burden of active participation in a class action. As a practical matter, therefore, it was factually insupportable for the appellate court to deny the petitioners' appellate participation on this basis.

incorrectly limited its inquiry to a consideration of whether the petitioners should have been allowed intervention at trial, thereby focusing on whether the representative class plaintiffs adequately represented the class. The question of the adequacy of the Radol plaintiffs' *trial* representation was only germane to the determination of the Armstrong plaintiffs' Motion to Intervene before Judge Rubin and their appeal from his denial of the same. The Armstrong plaintiffs filed two notices of appeal, Appendix at 6a and 8a, and did not contest the Sixth Circuit's affirmance of the denial of intervention at the trial court level, nor do they raise this issue in this Petition. Petitioners submit that they were before the Sixth Circuit as of right and that the question of the propriety of trial intervention was irrelevant.

The courts have a continuing duty to protect the interests of absent class members. Therefore, the federal courts have held that class members have automatic rights of appeal unlike non-class plaintiffs; *e.g.*, members objecting to a proposed settlement have a right to appeal from an approval of that settlement. *E.g.*, *Armstrong* v. *Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1980); 2 H. Newberg, *Class Actions* § 11.59 (2d ed. 1985). Even where class members have the right to opt out of the class, they are nevertheless able to appeal an order approving a settlement which they deem unsatisfactory. *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30, 32 (3d Cir. 1971).

Petitioners' appellate standing is analogous to this right of class members to object to an appeal from settlement agreements. In both situations, named class plaintiffs have proceeded in a way that is, in the opinion of the representative class plaintiffs, best for the entire class. Absent class members who feel their interests are not being adequately represented, however, may appeal, and this right exists independently of any procedural prerequisite, *e.g.*, a motion to intervene, trial participation. *Armstrong* v. *Board of School Directors*, 616 F.2d at 327. *Accord*, *Re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1121 (7th

Cir.), *cert. denied*, 444 U.S. 870 (1979), *and later appealed*, *Oswald* v. *McGarr*, 620 F.2d 1190 (7th Cir. 1980.)[6]

These contrary rulings from courts of appeal of other circuits demonstrate a conflict among circuits as to this important matter of the rights of class members to appeal adverse rulings.

In this case, petitioners' appeal from the final judgment was procedurally grounded in their Notice of Appearance and timely filed Notice of Appeal. The Sixth Circuit Court of Appeals' granting of the respondents' Motion to Dismiss this appeal was contrary to accepted judicial proceeding. The inequitable effect of the dismissal is to bind petitioners (and all other class members) to the final judgment, which was rendered without the appellate court's consideration of crucial issues which could afford relief. *Cooper* v. *Federal Reserve Bank*, ____ U.S. ____, 104 S.Ct. 2794, 2799 (1984) (a properly entertained class action is binding on all class members). Such a result in this case is unwarranted and erroneously harsh. The Armstrong plaintiffs therefore urge this Court to recognize the legitimacy of the Armstrong plaintiffs' appeal as of right and to remand the cause to the Sixth Circuit for consideration of the substantive issues presented in petitioners' brief on the merits.

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[6] *See also* analogous state court decisions, *e.g.*, *Piper* v. *Central Louisiana Electric Co.*, 437 So.2d 997, 999 (La. App. 1983) (sole object of appeal is to give aggrieved party recourse to superior tribunal for correction of judgment of inferior court, and such right is extended not only to parties to a suit but also to a third person who is allegedly aggrieved by the judgment).

That one aggrieved by a judgment is entitled to bring an appeal challenging the same is illustrated also in the case recognizing an attorney's right to maintain an appeal concerning the award of attorney's fees to his or her client below. *E.g.*, *Fickle* v. *Adkins*, 385 So. 2d 1141 (Fla. Dist. Ct. App. 1980); *Tisdale* v. *Wheeler Brothers Grain Co.*, 599 P.2d 1104 (Okla. 1979), *later proceeding*, *Abel* v. *Tisdale*, 619 P.2d 608 (1980), *later appealed*, 673 P.2d 836 (1983).

POINT II

EVEN IF PETITIONERS HAD NO APPEAL AS OF RIGHT, IT WAS WITHIN THE INDEPENDENT, INHERENT POWER OF THE SIXTH CIRCUIT TO ALLOW PETITIONERS FULL APPELLATE PARTICIPATION, AND IT WAS THEREFORE A DENIAL OF DUE PROCESS AND AGAINST PROPER JUDICIAL PROCEDURE FOR THE COURT TO REFUSE TO CONSIDER THE APPROPRIATENESS OF PETITIONERS' INTERVENTION AT THE APPELLATE LEVEL FOR PURPOSES OF REVIEWING SUBSTANTIVE ISSUES WHICH THE NAMED CLASS PLAINTIFFS HAD ABANDONED ON APPEAL

Petitioners submit they were properly before the Sixth Circuit Court of Appeals pursuant to their appeal as of right, as discussed in Point I, *supra*. However, even if they were not entitled to an appeal as of right, the Sixth Circuit had independent, inherent power to allow the Armstrong plaintiffs to intervene at the appellate level as full participants.[7] It was not bound by the trial court's decision denying intervention below nor were the governing considerations the same.

Federal appellate courts unquestionably have independent, inherent power to allow appellate participation where none was given (or in some cases even sought) in the trial court. Thus, in *Overby* v. *United States Fidelity & Guaranty Co.*, 224 F.2d 158, 162 (5th Cir. 1955), a non-party adversely affected by a trial court's ruling concerning property in his

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[7] In remarks from the bench on January 22, 1985, the panel erroneously stated that it had no independent discretion to allow petitioners' appellate appearance. Appendix at 3a. The court further implied that it could not independently consider intervention because no formal motion had been filed at the appellate level. *Id.* This is not a prerequisite, *Adams* v. *Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); moreover the Sixth Circuit effectively waived the need for any formal request when it directed counsel for all parties, petitioners specifically included, to brief and argue the substantive issues, which they did.

possession was allowed to appeal that order. In that case, the court stated unequivocally that the non-party appellant had "standing to maintain this appeal whether or not he was formally recognized as a party to the suit in the district court." Likewise, in *McKenna* v. *Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) appellate intervention was recognized although the court cautioned, "A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." *See also*, *Preston* v. *United States*, 284 F.2d 514 (9th Cir. 1960); *Holland* v. *Board of Public Instruction of Palm Beach County, Florida*, 258 F.2d 730 (5th Cir. 1958).

The clear recognition by these courts of the power to allow such intervention demonstrates a conflict among circuit courts of appeal as to this question.

State appellate courts likewise have the same independent discretion to allow appellate intervention where there was no participation in the trial below. *See generally*, *Toulouse* v. *New York Life Insurance Co.*, 235 P.2d 1003 (Wash. 1951); *Re Roth's Estate*, 52 A.2d 811 (N.J. 1947); *McCullough* v. *Scott*, 109 S.E. 789 (N.C. 1921); *Mires* v. *Hogan*, 192 P.811 (Okla. 1920). As in the federal system, to prosecute an appeal as a non-party one must be a person "substantially aggrieved" by a lower court's judgment. *E.g.*, *Kornfield* v. *Perl Mack Liquors, Inc.*, 567 P.2d 383 (Colo. 1977); *Re Tomlinson's Estate*, 359 N.E. 2d 109 (Ill. 1976) (interests that will justify an appeal by one not a party below must be direct, immediate, and substantial; such interests must be interests which would be prejudiced by the judgment or benefit from its reversal).

Auerbach v. *Bennett*, 408 N.Y.S. 2d 83 (1978), *modified*, 419 N.Y.S. 2d 920 (1979) presents a case strikingly similar to the present one. There a representative plaintiff in a derivative suit chose not to appeal the grant of summary judgment for the defendants. Another shareholder, who had filed a separate but similar action, filed a notice of appeal and was permitted to argue the merits on appeal. The court expressly

recognized that "the power exists in the court to grant intervention whenever the circumstances justify such exercise of discretion." *Id.* at 86.

The criteria for allowing appellate intervention is whether the person seeking appellate review has been adversely affected by the judgment below. Petitioners fell squarely within this requirement; moreover, they were parties to the trial proceeding. The proper question for the Sixth Circuit, therefore, was whether the Radol plaintiffs properly represented the class *on appeal*. Clearly where, as here, representative class plaintiffs fail to appeal as error several key claims which could provide relief for the class, then the representative class members have abandoned those claims and failed to represent the class adequately *at the appellate level*. Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that the class representative "fairly and adequately protect the interests of the class." This requirement anticipates a "vigorous prosecution." *See, e.g., Senter* v. *General Motors Corp.* 532 F. 2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *see also, Jordan* v. *Global Natural Resources, Inc.*, 102 F.R.D. 45 (S.D. Ohio 1984); *Stoller* v. *Baldwin United Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 91, 678 (September 19, 1984). Abandoning important issues on appeal, for no discernible reason, is not within the literal requirements or the spirit of Rule 23.

Unlike the cases cited above, the Sixth Circuit did not make a discretionary decision, but rather held that it lacked any power to exercise its discretion. Petitioners ask this court not to review the abuse of its discretion but rather to review the ruling that the court lacked the discretionary power to allow intervention at the appellate stage of the proceedings.

CONCLUSION

Petitioners have sought relief in this Court so that significant arguments to the class claim will be heard. Petitioners therefore respectfully pray the Court grant a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals granting the respondents' Motion to Dismiss petitioners' appellate participation.

Petitioners have preserved claims not within the scope of the Sixth Circuit's decision on the merits which could provide substantial relief to the class but which will be forever lost if petitioners are not allowed to be heard. The representative class plaintiffs' abandonment of the claims mandates this result. To deny petitioners appellate participation is a denial of due process and against proper judicial procedure.

The writ should issue.

Respectfully submitted,

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Attorneys for Petitioners

January 29, 1986

CERTIFICATE OF SERVICE

I, Douglas G. Cole, hereby certify that I am a member of the Bar of the Court, that I am one of the attorneys for petitioners on the foregoing Petition, and that three copies of the foregoing Petition were served on all counsel of record to the proceedings below by United States mail this date by deposit of same in a United States post office or mail box, First Class postage prepaid, addressed to counsel of record at their respective office addresses.

DATED: January 29, 1986

/s/ _____
DOUGLAS G. COLE

APPENDIX A

Partial Transcript of Oral Argument Before A Panel of the United States Court of Appeals, Sixth Circuit, on January 22, 1985

SPEAKER D: I am here today on behalf of appellants intervenor-appellants, Armstrong, et al. We were prepared for a short argument, as a matter of fact we were prepared for three minutes vs. five.

SPEAKER A: Well, we'll give you the five minutes.

SPEAKER D: So the two minutes is somewhat of a gift. And I think what is most important to address in the outset.

SPEAKER A: Well, you better address the motion at least for me, because I don't quite understand how you're here legitimately.

SPEAKER D: The way we first got here occurred during the course of the trial. The court probably knows we as a law firm, k ɔw that out client was ready to participate as party plaintiff counsel in the trial. But our clients welcome members of the committee (INAUDIBLE) Marathon shareholders (INAUDIBLE) committee and members of that committee span all types of different shareholders relative to the merger, those who (INAUDIBLE) merger, (INAUDIBLE) appraisal remedy, and the state court, plus those who did not, therefore, whatever recovery they would have would come as members of the class. The hired counsel who monitored the trial, and as they monitored the trial, it became apparent to them that there were some very important issues that could establish liability, that were not being presented and not being preserved so that they could be presented to the jury. Foremost amongst these was the question involving the adequacy of disclosure in the proxy statement as to the actual value of these net assets which Mr. (INAUDIBLE) referred to. Specifically, there is a statement in the proxy statement. . .

SPEAKER A: Well how is that different from what he's arguing here? You mean there are other things. . .

SPEAKER D: Well, there are other points. I'm trying to give a little background. The way they first got involved in the case was by urging past representative counsel to seek to amend a complaint to add a claim saying that the proxy statement contained an affirmative misrepresentation when it stated that the bottom line asset value of Marathon was reflected both in the First Boston Report and the Strong Reports were not indicative of the possible liquidation values. Prior to that, Judge Rubin, by means of a summary judgment, had ruled out any claim that related solely to the degree or type of adequacy of disclosure in the proxy statement. Therefore, our client is in the position of seeking to add claim (INAUDIBLE) the trial, is basically (INAUDIBLE) . . . the evidence that would (INAUDIBLE) to the legality of that proxy statement. Judge Rubin first ruled it in, and then later reversed himself and ruled it out. At that point, in order to assure that that particular point and other points relating more specifically to the merger as a separate and distinct transaction, to assure that these points were adequately addressed, adequately briefed and adequately presented to this court, we sought to intervene.

SPEAKER A: That was after the judgment went down, or after the verdict and all, right?

SPEAKER D: That's correct, but the Supreme Court case, I believe the Transworld Airlines, has indicated that a motion to intervene is timely and proper as long as it is made during the time during which an appeal can be taken, so I don't think that we can be faulted for that.

SPEAKER A: Well, now, he overruled your motion to intervene. And the question before us then on appeal, is whether he abused his discretion in denying your right to intervene and I guess his basic point was you've got about, . . . Mr. Weiss and his Plaintiffs are representing you adequately, and you don't have a big problem there and why is he wrong about that?

SPEAKER D: Well, there are three issues basically. There's the issue of discretionary intervention, an issue of mandatory

intervention, and there's an issue that goes directly to this court's discretion as to whether or not they want us to be part of this proceeding. Why is the judge wrong? Because first of all, in the issue that I just mentioned, with respect to the amendment to conform to the evidence relating to the statement in the proxy, that was given very cursory attention by class representatives. We believe the class representatives did an outstanding job presenting the issues that they saw important, but I think in order to protect the interest of all the class members and other shareholders of Marathon that can be affected by the (INAUDIBLE) of this case, there are other issues equally important which haven't achieved the same degree of attention, and we think that we should be in here so that they do.

SPEAKER C: You're saying that you're entitled to intervene because you want to emphasize a different issue than the Defendant's counsel.

SPEAKER D: That's correct.

SPEAKER C: Well, that way, we could have everybody in the class intervening because each of them thinks one issue is more important and have 50 lawyers up here on every appeal.

SPEAKER D: Well, I think that's one of the reasons why this rule is discretionary, and I think in order for this court to exercise its discretion . . .

SPEAKER C: You didn't ask to intervene in this court. You're appealing the District Court's judgment. So it's not a matter of our discretion.

SPEAKER D: I believe it's a matter of either the discretion of the trial court or the discretion of this court, and . . .

SPEAKER C: Why do we have discretion?

SPEAKER D: I think this court has inherent discretion to allow any party to appear before (INAUDIBLE) . . . The point I want to make is that I think the court has to look at the nature of the issues that we're presenting. Whether these issues are important or significant and should be a part of this court's decision-making in this case. And I think any comparison to the brief will indicate especially with regard to

legality of the merger, not only with respect to the statement in the proxy statement, but also the Rule 13e3, the questions of state fiduciary duty, the questions of fairness, the questions of legality of the squeeze-out merger, that if we're not allowed to appear at these proceedings, than these issues are going to be lost forever, and some very important rights that the shareholders at Marathon may have had may be lost forever. The other point I would make is that we didn't know until the briefs were filed in the appeal, what points would be urged on appeal, and we believe that there are some very significant points relating to the degree of protection to the minority shareholders that were presented in the trial court by Plaintiff's counsel that were ruled out of this case by means of summary judgment that were improperly ruled out and are only going to be presented and ruled upon by this court if we're allowed to proceed with this appeal. That's not something we ever could have known during the course of proceedings in the trial court.

SPEAKER A: Anything else you'd like to say to Mr. Jacobs, on the question of the motion to dismiss your appeal because you lack standing to pursue the appeal. In other words, because you are not a party in the court below. Anything else you'd like to say to us on that?

SPEAKER D: No, I think the only thing I would add is that the court has to look at the nature of the issues that we're raising and the importance of this case. I think that is the ultimate test, and if nothing else, as a last point, I think the issues are so important that, at the very minimum, we should be allowed to receive (INAUDIBLE).

SPEAKER A: Counsel, the court is prepared to rule on the motion and understand your zeal in pursuing your client's interest, and because of the importance of the case as you see it, the reason you would like to be here. But the court is going to grant the motion to dismiss your appeal, and the reason for that is that the Federal Rules of Civil Procedure present a structure in which these class action cases are to be tried and managed. They are necessarily difficult to manage under any circumstance, and to permit the class members to come in in-

dividually after the case has been tried and pursue points on appeal, is not, we just can't contain and manage these actions and there is no precedent for that. The Federal Rules of Civil Procedure don't require that. It's true that the court below could have granted your petition to intervene, but it did not, and we certainly can't say that Judge Rubin on that point, abused his discretion, and so, the motion filed by the Defendant Appellees to dismiss your appeal because you were not a party in the court below, is granted. Now, Mr. Tjarks, you've got a similar problem, so you better tell us why you're different from Mr. Armstrong.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-82-13

IRVING and CHARLOTTE RADOL, et al.
Plaintiffs,

v.

W. BRUCE THOMAS, et al.
Defendants.

NOTICE OF APPEAL

(Filed August 29, 1983)

Notice is hereby given that Frances Armstrong, Emma Webber and John Fedor, Jr., having entered an appearance pursuant to Fed. R. Civ. P. 23(C)(2)(C) and having moved to intervene pursuant to Fed. R. Civ. P. 24, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the judgment entered in these actions.

Said judgment was entered on the 30th day of June, 1983. The plaintiffs' motions for new trial were overruled by order entered the 28th day of July, 1983.

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
/s/ DOUGLAS G. COLE

2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2121

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal was served by ordinary United States mail, first class postage prepaid, on all counsel of record this 29th day of August, 1983.

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
/s/ DOUGLAS G. COLE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-82-13

IRVING and CHARLOTTE RADOL, et al.
Plaintiffs,

v.

W. BRUCE THOMAS, et al.
Defendants.

NOTICE OF APPEAL

(Filed September 19, 1983)

Notice is hereby given that Frances Armstrong, Emma Webber and John Fedor, Jr. hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final Order denying the application of Frances Armstrong, Emma Webber and John Fedor, Jr. to intervene in this action, said final Order having been entered on the 6th day of September, 1983, by Chief Judge Carl B. Rubin in the District Court for the Southern District of Ohio.

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
/s/ DOUGLAS G. COLE

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(513) 621-2120

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal was served by ordinary United States mail, first class postage prepaid, on all counsel of record this 19th day of September, 1983.

/s/ DOUGLAS G. COLE

APPENDIX D

IRVING RADOL, ET AL.,
Plaintiffs,

ALFRED V. TJARKS,
Plaintiff-Appellant,
(No. 83-3643)

FRANCES ARMSTRONG, EMMA WEBER,
JOHN FEDOR, JR.,
Plaintiffs-Appellants
(No. 83-3644 and 83-3670)

v.

W. BRUCE THOMAS, ET AL.
Defendants-Appellees.

ORDER

(Filed September 26, 1985)

BEFORE: MERRITT and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge

Upon consideration of the motions filed by the appellees in each of the above-captioned cases to dismiss the appeals; and

Further considering the responses of the respective appellants opposing those motions;

The court finds the motions to be well taken; it is therefore

ORDERED that each of these be, and they hereby are, dismissed.

ENTERED BY ORDER OF
THE COURT
JOHN P. HEHMAN, Clerk
By: LENOARD GREEN
Chief Deputy Clerk

APPENDIX E

No. 83-3644/3670

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IRVING RADOL, ET AL.,
Plaintiffs-Appellants,

v.

W. BRUCE THOMAS, ET AL.,
Defendants-Appellees.

ORDER

(Filed November 1, 1985)

BEFORE: MERRITT and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT
/s/ JOHN P. HEHMAN, Clerk

APPENDIX F

Excerpt from Rule 23 of the Federal Rules of Civil Procedure

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

. . . (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.